

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4335
Summary Calendar

MOHSEN NIKROOYAN,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service
(A27 915 483)

(October 21, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The issue in this appeal concerns whether Mr. Nikrooyan is eligible for asylum under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. The Board of Immigration Appeals ("BIA") held that Nikrooyan had not been persecuted by the Iranian government in the past, and that he did not have a well-founded

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

fear of persecution in the future. Consequently, the BIA held that Nikrooyan was not eligible for asylum. Because the BIA's findings are supported by substantial evidence, we affirm.

I

Mohsen Nikrooyan, a thirty-four year-old single male, entered the United States on March 9, 1987, as a non-immigrant tourist authorized to remain until April 15, 1987. A native and citizen of Iran, Nikrooyan was born in Tehran, the son of Moslem parents. His mother died in 1985, and his father, sister, and sister's family remain in Iran. His father, now retired, was employed by the economic ministry under the Shah's regime.

After completing his secondary education in Iran, Nikrooyan attended Riverdales College in England, completing a degree in Marine Engineering. The opportunity to study abroad was provided and financed by the government of Iran through a program sponsored by the National Iranian Oil Company ("NIOC"). Under this program, NIOC sent select students to England to study. In return, students were obligated to work for a subsidiary of NIOC, the National Iranian Tanker Company ("NITC") for a period of eight years after completing their degree. Nikrooyan's father was the guarantor of Nikrooyan's financial obligation.

The revolution leading to the Ayatollah Khomeini's rule took place in 1979 while Nikrooyan was studying in England. Although Nikrooyan was opposed to certain aspects of the new government, he nevertheless returned to Iran to satisfy his obligations to NIOC.

As an employee of the NITC, he expressed his distaste for the new government and their aggressive religious stance. However, Nikrooyan never joined any of the opposition groups active in Iran at the time.

Nikrooyan describes a number of incidents in support of his asylum claim. One such incident followed the Iraqi bombing of the vessel upon which he was a crew member. The crew was criticized for its handling of the incident, and Nikrooyan was suspended from work while the vessel was being repaired. Nikrooyan contends that he was suspended because he characterized Iran's war with Iraq as "stupid" at company meetings following the bombing of the vessel. Within two months of his initial suspension, he was reinstated and reassigned to another vessel with no demotion in rank or salary.

Later that year, Nikrooyan was accused of removing a picture of the Ayatollah Khomeini from the wall of the ship on which he was a crew member, and throwing the picture into the water. Nikrooyan testified that he was interrogated by the same government official he met with after the bombing of the first vessel. Although Nikrooyan stated that the official was "very angry," the official took no action against Nikrooyan.

Another incident Nikrooyan describes concerned the confiscation of his passport upon his return from England. Although there is no official confirmation, a relative informed him that his passport was retained because of his opposition to the

government. Eventually, however, Nikrooyan regained possession of his passport.

The last incident occurred in the summer of 1985. Nikrooyan, as a crew member of a vessel, was confronted by revolutionary guardsmen who sought to solicit votes from Iranians on board the vessel. Nikrooyan falsely told the guards that he was the only Iranian on board and that he had already voted. The guards returned to shore, obtained a crew list, and discovered that Nikrooyan had not voted, and that there were other eligible voters on board. Nikrooyan testified that he would have been arrested at that time if he had not been an employee of a government agency.

It was after this incident that Nikrooyan decided to leave Iran. He obtained a visa under the pretenses that he was enrolling in a work-related course in England. After eleven months in England, he entered the United States with a tourist visa obtained on a previous trip to the United States. Nikrooyan did not apply for asylum in England because of his fear that the English government would respond unfavorably to his claim due to its ties to the Iranian government.

Since his arrival in the United States, Nikrooyan has worked as a taxi driver and in a donut shop. In 1989, he received notice that his father had been levied against by the government of Iran for a sum of money owed as a result of Nikrooyan's education. Although the government is attempting to collect the money legally owed, there is no evidence that Nikrooyan's father or family has

been subjected to additional harassment. The Iranian government has filed charges against Nikrooyan in connection with Nikrooyan's failure to fulfill his obligation to NIOC, and has issued a warrant for Nikrooyan's arrest. Although Nikrooyan confirms that he has never been arrested or physically harmed by the Iranian government, he anticipates that he will be arrested upon his return because of his failure to fulfill his obligations related to the financing of his education.

II

When Nikrooyan first entered the United States, he was authorized to remain until April 15, 1987. He remained in the United States after the April 15 deadline, and he filed for asylum on July 30, 1987. In April 1988, the Department of State advised the Immigration Service that they believed Nikrooyan failed to establish a well-founded fear of persecution should he return to Iran. In November 1989, Nikrooyan's application for asylum was denied, and he was served with an Order to Show Cause, charging him with violating Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2) (Supp. 1993). In December 1989, Nikrooyan and counsel appeared before an immigration judge ("IJ") and conceded deportability. The IJ later held a hearing at which Nikrooyan testified in support of his asylum claim. After the hearing, the IJ rendered an oral decision denying Nikrooyan's request for asylum and withholding of deportation, but granting Nikrooyan voluntary departure. In March 1993, the Board of

Immigration Appeals affirmed the decision of the IJ, denying Nikrooyan both asylum and withholding of deportation, but granting him thirty days in which to voluntarily depart the country. Nikrooyan then filed this appeal.

III

In this appeal, we are authorized to review only the order of the BIA, not the decision of the immigration judge. Castillo-Rodriguez v. INS, 929 F.2d 181, 183 (5th Cir. 1991). In reviewing the Board's actions, we examine the factual findings to determine if they are supported by substantial evidence. INS v. Elias-Zacarias, ___ U.S. ___, 112 S.Ct. 812, 815, 117 L.Ed.2d 38 (1992); Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991). The substantial evidence standard requires only that the BIA's conclusion be based upon the evidence presented, and that the findings be substantially reasonable. Rojas v. INS, 937 F.2d at 189. Thus, the BIA's decision can be reversed only if Nikrooyan can show that the evidence he presented was "so compelling that no reasonable fact-finder could fail to find the requisite fear of persecution." INS v. Elias-Zacarias, 112 S.Ct. at 817. In this case, the BIA's finding that Nikrooyan failed to prove his eligibility for asylum or for withholding of deportation is supported by substantial evidence. Therefore, we affirm.

In this appeal, Nikrooyan argues that the IJ and the BIA erred in holding that he failed to prove his eligibility for asylum.¹ To be eligible for a grant of asylum, the alien must prove that he is a "refugee" within the meaning of the Immigration and Nationality Act. 8 C.F.R. § 208.13(a) (1993). The Act defines a refugee as "a person . . . who is unable or unwilling to return to, and in unable or unwilling to avail himself . . . of the protection of, [the country of origin] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion." 8 U.S.C. § 1101(a)(42)(A) (Supp. 1993). Thus, refugee status, and hence eligibility for asylum, rests on two alternate grounds: past persecution, or a well founded-fear of future persecution. 8 C.F.R. § 208.13(b) (1993).

In this case, both the IJ and the BIA determined that the confrontations with the government described by Nikrooyan do not

¹Originally, Nikrooyan sought both asylum and withholding of deportation. These are two distinct remedies and the standards for eligibility are different. Withholding of deportation requires a stricter standard of proof than a request for asylum. Compare Farzad v. INS, 802 F.2d 123, 125 (5th Cir. 1986)(holding that withholding of deportation requires a showing of clear probability of persecution) and Rojas v. INS, 937 F.2d 186, 189 (5th Cir. 1991)(qualifying for asylum requires a showing that persecution is a reasonable possibility). If an alien fails to meet the standards for asylum, then the alien necessarily fails to meet the more stringent standard for withholding of deportation. Rojas v. INS, 937 F.2d at 189. In this case, both the IJ and the BIA held that Nikrooyan failed to meet the statutory requirements for asylum. Because we agree that Nikrooyan did not prove his eligibility for asylum, it is unnecessary to address withholding of deportation.

amount to past persecution,² and these findings are supported by substantial evidence. To establish past persecution, the asylum applicant must show that he was harmed on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.13(b)(1); Castillo-Rodriguez v. INS, 929 F.2d at 184. In this case, the BIA held that although Nikrooyan had several confrontations with government officials, none were of such a nature that they must be considered persecution. For example, although Nikrooyan was suspended from work after abandoning a disabled vessel, the two-month suspension did not create a "substantial economic disadvantage" that would allow such action to be considered persecution. See INS v. Stevic, 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984); Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969). In a separate incident, the government confiscated Nikrooyan's passport upon his return from England. The BIA held that the confiscation was an effort by the government to keep valuable Iranian workers from abandoning their jobs. Further, the incident concerning the Ayatollah's picture never resulted in any action by the government, much less action that could be characterized as persecution. With respect to the incident with the revolutionary guards, Nikrooyan was protected by

²During his appeal to the BIA, Nikrooyan argued that the IJ made improper adverse credibility findings. In an effort to avoid the issue concerning these credibility findings, the BIA considered all of Nikrooyan's testimony as if it were true. For purposes of this appeal, we shall do likewise.

his connections with the government, rather than persecuted. In general, the threats of punishment made by the Iranian government were vague, and Nikrooyan has never claimed that he was arrested, detained, or physically harmed.³ In short, the actions taken by the Iranian government with respect to Nikrooyan were not of such a character and magnitude that asylum must be granted. As such, we hold that the BIA's judgment concerning the lack of past persecution is supported by substantial evidence.

Next, Nikrooyan contends that he is eligible for refugee status because he has a well-founded fear of future persecution. To prove a well-founded fear of future persecution, Nikrooyan must demonstrate (1) that he possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) that the persecutor is already aware, or could become aware, that he possesses this belief or characteristic; (3) that the persecutor has the capability of punishing him; and (4) that the persecutor has the inclination to punish him. In re Mogharrabi, 19 I&N 439 (BIA 1987). Although this standard incorporates both a subjective and an objective component, the focus is on the individual's genuine sense of fear, and that fear

³Nikrooyan argues that the statute does not require him to allege that he was arrested or physically harmed. Although there is no express requirement that a person be arrested or physically harmed in order to fall within the category of "refugee," such treatment would be evidence that the alien is being persecuted by the government. The fact that the IJ considered the lack of such treatment does not indicate, as Nikrooyan argues, that the IJ applied a higher standard than the law requires.

must be grounded in specific concrete facts. INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31, 107 S.Ct. 1207, 1212-13, 94 L.Ed.2d 434 (1987).

In this case, the BIA determined that there was not sufficient evidence to demonstrate a well-grounded fear of persecution, and we find that the BIA's determination is supported by substantial evidence. Specifically, the BIA held that Nikrooyan failed to prove that the Iranian government was inclined to persecute him.⁴ Nikrooyan argues, however, that the fact that charges against him have been filed with the Iranian Secret Police indicates that the government intends to persecute him.⁵ Although it is true that

⁴Nikrooyan argues on appeal that the BIA improperly took administrative notice of the fact that the Ayatollah Khomeini died in 1989, and that his death resulted in changes in the Iranian government. He argues that even though the Ayatollah himself died, there is no evidence that the government itself has changed. While we agree that it is unclear what impact the death of the Ayatollah Khomeini has had on the government of Iran, we will assume for our purposes here that there have been no real changes in the Iranian government.

⁵In support of his claim for asylum, Nikrooyan has presented a letter the Iranian government sent his father. In pertinent part, the letter provides:

This is to notify you that since your son has refused to come back to Iran after trying to contact him through our agency in London and still did not report to his job; according to his contract with N.I.O.C., we hold you responsible for all expenses for his four years education in the United Kingdom as Marine Engineer paid by N.I.O.C.

Furthermore, we have filed charges against him through the Iranian Secret Police, Ministry of the Judiciary, Gandarmary of the State [the military branch responsible for Iranian borders], and the Financial Department of N.I.O.C.

Nikrooyan may face charges for prematurely withdrawing from service to the NIOC, he has failed to demonstrate that the government action would be based upon Nikrooyan's race, religion, nationality, membership in particular social groups, or political opinion. The BIA held that, if anything, it appears that the Iranian government will be prosecuting Nikrooyan for violating an Iranian law of general applicability. Absent a showing that Nikrooyan would be unable to obtain a fair trial on these charges, asylum based governmental action in response to Nikrooyan's own behavior is not warranted. See Castillo-Rodriguez v. INS, 929 F.2d 181, 185 (5th Cir. 1991)(holding that government action based upon laws of general applicability is not persecution). In short, the BIA held that Nikrooyan's fears stem not from persecution for political or religious beliefs, but rather from Nikrooyan's own failure to fulfill his contractual obligations. See INS v. Elias-Zacarias, ___ U.S. ___, 112 S.Ct. 812, 816 117 L.Ed.2d 38 (1992)(holding that alien must demonstrate that government action taken against him because of his political or religious beliefs). Because there is

Nikrooyan argues that the fact that charges had been filed with the Iranian Secret Police indicates the government's intent to persecute him should he return to Iran. Nikrooyan, however, provided no evidence that the Iranian Secret Police are engaged in such persecution. Although the term "Secret Police" holds certain connotations, the mere mention of the Secret Police evidently did not persuade the IJ and the BIA that Nikrooyan would be persecuted upon his return. Because there is no real evidence to the contrary, we are unwilling to overturn the BIA's holdings.

substantial evidence in the record to support this holding, we will not alter the BIA's order.

IV

For the foregoing reasons, the decision of the Board of Immigration Appeals is

A F F I R M E D.